

## Constitutional Law - Johnson v. Louisiana: State Criminal Juries Need Not Reach Unanimous Verdicts

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### Recommended Citation

Phyllis B. Dolinko, *Constitutional Law - Johnson v. Louisiana: State Criminal Juries Need Not Reach Unanimous Verdicts*, 22 DePaul L. Rev. 635 (1973)

Available at: <https://via.library.depaul.edu/law-review/vol22/iss3/3>

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CONSTITUTIONAL LAW—JOHNSON V. LOUISIANA:  
STATE CRIMINAL JURIES NEED NOT  
REACH UNANIMOUS VERDICTS

At 6:30 A.M., January 20, 1968, Frank Johnson was arrested for armed robbery based on information secured from a confidential police informant. Following his identification at a police line-up, Johnson was charged with armed robbery.<sup>1</sup> At trial, nine members of the twelve member jury found Johnson guilty. He was sentenced to thirty-five years at hard labor in the Louisiana State Penitentiary.<sup>2</sup> In his appeal to the United States Supreme Court, Johnson challenged the validity of the nine-to-three verdict as authorized for crimes at hard labor by both the Louisiana Constitution<sup>3</sup> and its Code of Criminal Procedure.<sup>4</sup> The Court held that the provisions of the Louisiana law permitting less-than-unanimous, that is, majority, verdicts in criminal trials do not violate the due process clause of the fourteenth amendment for failure to satisfy the reasonable doubt standard. Nor does the Louisiana legal scheme, which varies the difficulty of proving guilt with the severity of the offense, constitute an invidious classification violative of equal protection.<sup>5</sup> *Johnson v. Louisiana*, 406 U.S. 356 (1972).

Some time after Johnson's trial in Louisiana, three men were separately tried in Oregon and convicted, respectively, for assault with a deadly weapon, burglary in a dwelling, and grand larceny. Each defendant was sentenced to a prison term of less than five years.<sup>6</sup> In each of the above

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1. Brief for Appellee at 1-3, *Johnson v. Louisiana*, 406 U.S. 356 (1972). The amount of money allegedly taken during the robbery was \$631.

2. *State v. Johnson*, 255 La. 314, 230 So.2d 825 (1970).

3. LA. CONST. art. 7, § 41. (Cases in which the punishment may be at hard labor, shall be tried by a jury of five, all of whom must concur to render a verdict; cases in which the punishment is necessarily at hard labor, by a jury of twelve, nine of whom must concur to render a verdict; cases in which the punishment may be capital, by a jury of twelve, all of whom must concur to render a verdict).

The nine out of twelve jury verdict first appeared in the Louisiana Constitution of 1898. No explanation was offered for the change to the majority verdict, but an earlier case *State v. Green*, 7 La. Ann. 518, 520 (1852) considered the frequency of jury disagreement a "great evil." Brief for Appellee at 4, n.2, *Johnson v. Louisiana*, 406 U.S. 356 (1972).

4. LA. CODE CRIM. PROC. art. 780 (prohibits waiver of jury trial in capital or necessarily at hard labor cases). Brief for Appellee at 5, n. 3, *Johnson v. Louisiana*, 406 U.S. 356 (1972).

5. Space restrictions prohibit the analysis of the equal protection argument.

6. Brief for Petitioners at 4, *Apodaca v. Oregon*, 404 U.S. 404 (1972).

trials, the jury deliberated for less than an hour before returning a less-than-unanimous guilty verdict as permitted by the Oregon Constitution.<sup>7</sup> Following the Oregon Court of Appeals' rejection of petitioners' consolidated claim that only a unanimous jury verdict could convict them,<sup>8</sup> the Supreme Court of Oregon denied review, having only recently decided this issue.<sup>9</sup> In their petition to the United States Supreme Court,<sup>10</sup> the petitioners contended that their convictions, procured by less-than-unanimous jury verdicts, denied their rights to trial by jury under the sixth and fourteenth amendments.<sup>11</sup> The Court held that the sixth amendment right to trial by jury in criminal cases, as applied to the states by the fourteenth amendment, does not require the states to provide unanimous jury verdicts. *Apodaca v. Oregon*, 406 U.S. 404 (1972).

These decisions have multiple significance. They are the first Court holdings to declare that due process does not require the states to provide for unanimous jury verdicts in criminal trials. The Court thereby raises serious questions as to how meaningful the presence of minority viewpoints on a jury will be if minority consent need not be obtained to achieve a verdict. Considered separately, the *Johnson* decision authorizes a narrow view of what constitutes reasonable doubt, held fundamental to due process in *In re Winship*.<sup>12</sup> *Apodaca* not only continues the *Williams v. Florida*<sup>13</sup> trend of functional analysis of the jury right to determine what is essential to that right, but also resolves fears raised by *Williams* that a similar analysis of the federal jury right would lead to its dilution. The federal criminal jury will remain as it was known at common law at the time our Constitution was written, but its requirement of unanimity is only "gloss" not to be required of the states.

This note will analyze the impact of allowing less-than-unanimous verdicts on other elements of jury trial found fundamental in criminal cases: (1) the need to find guilt beyond a reasonable doubt; (2) the requirement that the jury represent a cross section of the community; and (3) the jury's duty to deliberate fully and reach a decision impartially.

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7. ORE. CONST. art. I, § 11 (provides for ten-to-two verdicts for crimes other than murder tried in the circuit court). See generally Comment, *Should Jury Verdicts be Unanimous in Criminal Trials?*, 47 ORE. L. REV. 417 (1968).

8. *State v. Plumes*, 1 Or. App. 483, 462 P.2d 691 (1970).

9. *State v. Gann*, 254 Or. 549, 463 P.2d 570 (1969).

10. 406 U.S. at 404.

11. See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (trial by jury guaranteed to the defendants in state trials wherever the sixth amendment would so require in the federal courts).

12. 397 U.S. 358 (1970).

13. 399 U.S. 78 (1970) (the twelve member jury known to common law not required of the states by due process).

The right to trial by jury in criminal cases is mentioned twice in the Constitution; once in article III, § 2, "the trial of all crimes, except in cases of impeachment, shall be by jury . . ." and again in the sixth amendment:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

Historically, the jury trial has represented a restraint on the federal government's arbitrary power.

When Englishmen colonized what came to be called the United States, they brought with them their common law heritage, including the right to jury. Although later scholars have disputed the Magna Carta as the source of that right,<sup>14</sup> the colonists, as did other Englishmen, appealed to that declaration for the protection of the right to trial by jury. The first ordinance passed by the Plymouth Colony in 1623 required that all criminal facts be tried by a jury of twelve honest men.<sup>15</sup> In 1774, the colonies were party to the National Declaration of Rights which included the right to jury as the "birthright and inheritance" of all Englishmen.<sup>16</sup> Among the grievances cited in the Declaration of Independence was the frequent deprivation by the Crown of the colonists' right to jury.<sup>17</sup> When the Constitution doubly guaranteed the right to jury in criminal trials, it was the concept of the common law jury that existed at that time that was incorporated into article III and into the sixth amendment.<sup>18</sup> The common law jury required the unanimous verdict of twelve men.<sup>19</sup> Therefore, the federal jury could require nothing less.<sup>20</sup>

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14. *Maxwell v. Dow*, 176 U.S. 581, 609 (1900) (dissenting opinion cites numerous scholars on the issue of the jury trial right as derived from Magna Carta). See generally 2 POLLOCK & MAITLAND, *HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, (2d ed. 1898, reissued by Cambridge University Press, 1968).

15. 176 U.S. at 609.

16. *Id.* at 610.

17. *Id.* at 609.

18. *Thompson v. Utah*, 170 U.S. 343, 350 (1898); accord, *Callan v. Wilson*, 127 U.S. 540, 549 (1888) (U.S. CONST. art. III "is to be interpreted in the light of the principles, which at common law, determined whether the accused, in a given class of cases, was entitled to trial by jury . . .").

19. 2 POLLOCK & MAITLAND, *supra* note 14, at 625 (unanimous verdict had emerged before the end of the fourteenth century). The fact that the contemporaries of our U.S. Constitution considered it as vital to jury trial seems more relevant than the majority verdict advocates' argument that the unanimous verdict evolved from the majority verdict first known to common law. See Ryan, *Less than Unanimous Jury Verdicts in Criminal Trials*, 58 J. CRIM. L., C. & P.S. 211, 213 (1969); see also Brief for Appellee at 6, *Johnson v. Louisiana*, 406 U.S. 356 (1972).

20. *Andres v. United States*, 333 U.S. 740, 748 (1948); accord, *Thompson v.*

Although the right to a common law jury existed, the Court had to determine whether that right could be waived, expressly or by silence, in whole or in part, without destroying the jurisdiction of the federal court. *Thompson v. Utah*, holding that the common law jury must consist of twelve persons to try serious criminal offenses, denied that waiver of a jury was possible.<sup>21</sup> Justice Harlan, for the Court, declared that any waiver of the twelve member jury would destroy the jurisdiction of the court and void its decision.<sup>22</sup> He defined the constitutional right as requiring the "unanimous verdict of a jury of twelve persons."<sup>23</sup>

Only six years after the *Thompson* decision, the Court ruled that a jury could be waived entirely for petty offenses since these were not included within the constitutional right to jury.<sup>24</sup> The Court reasoned that where neither the Constitution, statute, nor public policy prohibited waiver, an accused could waive any privilege given to him without destroying the court's jurisdiction.<sup>25</sup> To reach this conclusion the Court construed the sixth amendment's language of "right" to jury as the last manifestation of legislative intent which should take precedence over article III's mandatory language requiring jury trial for "all crimes."<sup>26</sup> Justice Harlan, dissenting, objected that parties cannot consent to jurisdiction voided by jury waiver except by the plea of guilty.<sup>27</sup>

If a whole jury of twelve could be waived, could a single juror be waived, if he became too ill to continue serving, without voiding the court's jurisdiction? In *Patton v. United States*,<sup>28</sup> this question was certified to the Court:

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Utah, 170 U.S. 343 (1898) (dictum), *Maxwell v. Dow*, 176 U.S. 581 (1900) (dictum). See also *Am. Publishing Co. v. Fisher*, 166 U.S. 464, 468 (1897) (requiring unanimity in seventh amendment jury trials in civil suits); cf. *Walker v. Sauvinet*, 92 U.S. 90, 92-3 (1875) (unanimous verdict not required in state civil trials by seventh amendment). *Contra*, *Williams v. Florida*, 399 U.S. 78 at 97 (denying that every element known to jury trial at common law must be retained). *Williams* interpreted the congressional intent not to require unanimous verdicts from the fact that the sixth amendment as introduced initially by James Madison, and as approved by the House, provided for unanimity; but the Senate deleted this requirement.

21. 170 U.S. 343 (1898).

22. *Id.* at 353.

23. *Id.* at 351 (dictum); *accord*, *Maxwell v. Dow*, 176 U.S. 581 (1900) (dictum) (but *Maxwell* itself stands for the proposition that states are not bound by federal jury requirements).

24. *Schick v. United States*, 195 U.S. 65, 67 (1904).

25. *Id.* at 72.

26. *Id.* at 68-69. *Contra*, *Patton v. United States*, 281 U.S. 276 (1930) (art. III and sixth amendment are substantially contemporaneous).

27. 195 U.S. at 81 (Harlan, J., dissenting).

28. 281 U.S. 276 (1930). For critiques of this case, see *Fournier v. Gonzalez*, 269 F.2d 26, 28 (1st Cir. 1959); Grant, *Waiver of Jury Trial in Felony Cases*, 20 CALIF. L. REV. 132, 152 (1931).

Whether the constitutional right of one on trial for a crime to a jury of twelve persons may be waived? According to the Court's analysis, any element of the common law right to jury can be waived on the theory that the right to jury can be waived.<sup>29</sup> Three elements were considered essential to the federal jury by the Court in *Patton*: (1) a jury of exactly twelve persons; (2) the presence of the judge to supervise the trial, instruct the jury as to law and advise them in respect to facts; and (3) a unanimous verdict.<sup>30</sup> If waiver could result in the elimination of a jury of twelve, an admitted essential to the federal jury, how secure were the other essentials?

Waiver of one juror upon advice of counsel as in *Patton* might be acceptable; but in *Adams v. United States*, a layman, charged with the felony of using the mails to defraud, waived his right to jury without advice of counsel. The appeal turned on whether a waiver of jury trial could be intelligently given without the advice of counsel. The Court answered affirmatively. The accused has the right to exercise his free and intelligent choice, and with the considered approval of the Court, may waive both his right to trial by jury and to assistance of counsel in making that decision.<sup>31</sup>

In the 1950's, two conflicting decisions were handed down from the first and sixth circuits on the issue of jury unanimity. Both cases were decided on the basis of fifth amendment due process. *Hibdon v. United States*<sup>32</sup> held that a defendant in a criminal trial could not voluntarily waive the requirement of unanimity to avert a hung jury and still retain a properly constituted federal court.<sup>33</sup> Although majority verdicts were proper under the then existing Constitution of Puerto Rico, such verdicts could not stand if in violation of fifth amendment due process. Therefore, when the defendant Fournier challenged the majority verdict that convicted him of murder under the laws of Puerto Rico, he contended that anything less than a unanimous verdict would deny him fifth amendment due process.

The United States Court of Appeals of the First Circuit, in deciding *Fournier v. Gonzalez*,<sup>34</sup> challenged *Hibdon's* view that proof beyond a rea-

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29. 281 U.S. 276.

30. *Id.* at 288.

31. 317 U.S. 269, 275 (1942).

32. 204 F.2d 834 (6th Cir. 1953) (two alternate grounds for reversal are given); noted in, 67 HARV. L. REV. 897 (1954), 52 MICH. L. REV. 911 (1954), 21 U. CHI. L. REV. 438 (1954); other notes cited in 47 ORE. L. REV. 425, n.32 (1968).

33. See *United States v. Fioravanti*, 412 F.2d 407, 416-18 (3rd Cir. 1969) (use of *Allen* charge prospectively error). So long as unanimous verdicts are required in criminal cases, there are three possible jury decisions: (1) not guilty of any charge, (2) guilty of one or more counts of indictment, (3) no verdict because of lack of unanimity. "The possibility of a hung jury is as much a part of our jury unanimity scheme as are verdicts of guilty or not guilty."

34. 269 F.2d 26 (1st Cir. 1959).

sonable doubt, fundamental to due process,<sup>35</sup> implicitly required a unanimous verdict. It decried this reading as "wholly unsupported by authority" and "patently erroneous."<sup>36</sup> Even if Puerto Rico were a state rather than a territory, the court reasoned that the fourteenth amendment due process clause would not require her juries to render unanimous verdicts.<sup>37</sup> Not until *Johnson* did the Court act to resolve the *Hibdon-Fournier* conflict as to whether proof beyond a reasonable doubt required a unanimous verdict.

In ordinary criminal trials, it is more often the state rather than the federal government who is the prosecutor.<sup>38</sup> Following passage of the fourteenth amendment in 1868, the question arose as to whether federal standards would be imposed on state juries.<sup>39</sup> In *Maxwell v. Dow*,<sup>40</sup> a divided Court followed the precedent of the *Slaughterhouse Cases*<sup>41</sup> and sharply distinguished between federal and state jury rights: "There is no intimation here that among the privileges or immunities of a citizen of the United States [is] the right of trial by jury in a state court for a state offense. . . ."<sup>42</sup> The Court reasoned that the right to jury trial was not derived from citizenship, but existed in favor of all individuals as against the federal government's power.<sup>43</sup> If a state chose, it could dispense with jury trial, the Court having never affirmed jury trial to be required by due process of law.<sup>44</sup> Under federalism, whether the verdict should be unanimous or not was a matter for the people of the state to decide.<sup>45</sup> Three years later, the Court, in construing a congressional resolution annexing Hawaii, viewed the unanimous jury verdict as not fundamental to due process, but merely as a matter of procedure<sup>46</sup> and so permitted a majority verdict to stand.

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35. 397 U.S. 358 at 364.

36. 269 F.2d 26 at 29.

37. *Id.* at 28.

38. U.S. CONST. art. III, § 2 defines the jurisdiction of the federal court. It includes the U.S. territories; see *Thompson v. Utah*, 170 U.S. 343 (1898); *Hawaii v. Mankichi*, 190 U.S. 197 (1903) as well as the District of Columbia, *Callan v. Wilson*, 127 U.S. 540 (1888).

39. *Hurtado v. California*, 110 U.S. 516 (1884) (The Court denied that due process was violated by California's use of prosecution upon information rather than indictment).

40. 176 U.S. 581, 594 (1900).

41. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1873).

42. 176 U.S. at 594.

43. *Id.* at 596.

44. *Id.* at 603 (dictum) (citing with approval *Hurtado v. California*, 110 U.S. 516).

45. *Id.* at 605.

46. *Hawaii v. Mankichi*, 190 U.S. 197, 218-19 (Congressional Resolution of July 7, 1898 permitted municipal legislation of Hawaii not contrary to the U.S.

The severity of the *Maxwell* edict against incorporation of the sixth amendment forced succeeding attempts to extend its protections to the states to focus on the due process clause.<sup>47</sup> Early Court inquiries centered on whether some particular procedural safeguard must be required of a state since no civilized system of justice could be imagined without that safeguard.<sup>48</sup> Using this type of test, the Court in *Palko v. Connecticut*<sup>49</sup> was able to conclude that the right to trial by jury was not essential to a scheme of criminal justice. As the fundamental fairness test fell into disfavor because of its subjective approach,<sup>50</sup> a process of selective incorporation of specific clauses of the first eight amendments to the states was growing.<sup>51</sup>

It was not until 1968, in the case of *Duncan v. Louisiana*,<sup>52</sup> that the Court extended the sixth amendment right to jury to the states. *Duncan* delineated a new test based not on imaginary legal systems, but on whether the safeguard is fundamental within the context of the criminal processes that exist in the states. Unlike *Palko*, *Duncan* held that jury trial is fundamental to the American scheme of justice.<sup>53</sup> Even where the right to a jury is waived, knowledge of that option exercises a restraint on judicial and prosecutorial unfairness and thus fulfills the jury's purpose.<sup>54</sup> Therefore, the Court held: "[T]he Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee."<sup>55</sup> But was the sixth amendment "gloss" also incorporated? Justice Fortas feared that the slavish following of all of the sixth amendment's bag and baggage

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Constitution to remain in force until Congress could incorporate and provide a territorial government for Hawaii).

47. *Maxwell v. Dow*, 176 U.S. 581 (1900); *accord*, *Spies v. Illinois*, 123 U.S. 131, 180 (1887) ("whether a cross-examination must be confined to matters pertinent to the testimony-in-chief, or may be extended to the matters in issue, is certainly a question of state law as administered in the courts of the State, and not of Federal law.") *See Stein v. New York*, 346 U.S. 156, 195-96 (1953) (coerced confessions introduced into evidence); *West v. Louisiana*, 194 U.S. 258, 262 (1904) (right of confrontation); *Brown v. New Jersey*, 175 U.S. 172, 174 (1899) (procedure in state courts).

48. *See Duncan v. Louisiana*, 391 U.S. 145, 149 n.14 (1968).

49. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (dictum) (double jeopardy clause of fifth amendment not applicable to the states); *overruled in*, *Benton v. Maryland*, 395 U.S. 784 (1969).

50. *See, e.g.*, 391 U.S. 145 at 168-71 (Black, J., concurring); *but see* 391 U.S. at 176 (Harlan, J., dissenting).

51. *See* *cites*, 391 U.S. 145 at 148, nn. 4-12 and accompanying text.

52. 391 U.S. 145 (1968).

53. *Id.* at 149-50 n.14.

54. *Id.* at 158.

55. *Id.* at 155 (specifically overrules *Maxwell v. Dow*, 176 U.S. 581 (1900)).



"would inflict a serious blow upon federalism."<sup>56</sup> Justice Black retorted, "I have never believed that under the guise of federalism the States should be able to experiment with the protections afforded our citizens through the Bill of Rights."<sup>57</sup>

*Williams v. Florida*<sup>58</sup> resolved the federalism versus incorporation dispute in favor of the former. Justice White, writing for the majority, saw the essential feature of the jury as the "interposition between the accused and his accuser of the common-sense judgment of a group of laymen."<sup>59</sup> But *Williams*, by questioning the continued validity of all the common law jury requirements, could be read to imply that all the federal jury standards would be open to revision.<sup>60</sup> If *Duncan* implied a uniform standard for federal and state juries, *Williams* suggested that the price of incorporation could be the application of the lower state standards to both juries. *Apodaca* puts these fears to rest. The double standard for jury trial will continue to exist: the federal jury will remain as known at common law while the states will be free to experiment with the jury within the confines of due process.

Since *Duncan* does not have retroactive effect,<sup>61</sup> it could not be utilized by Johnson, whose trial preceded that decision. Instead, he contended that the reasonable doubt standard, required of the states in criminal trials by *In re Winship*,<sup>62</sup> could only be given substance if construed to require the unanimous verdict. Because three jurors at his trial had voted to acquit him, Johnson argued that the state of Louisiana had failed to persuade them of his guilt beyond a reasonable doubt. In other words, the doubt remaining in the minds of the three acquitting jurors should be sufficient to raise a reasonable doubt in the minds of the remaining nine jurors. From this he inferred that the remaining nine jurors violated their duty when charged to convict only if convinced of guilt beyond a reasonable doubt.<sup>63</sup>

This argument is premised on a reverse application of the *Allen* charge.<sup>64</sup> While in *Allen* the judge charged the dissenting juror to consider

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56. *Bloom v. Illinois*, 391 U.S. 194, 213 (1968) (Fortas, J., concurring in companion case to *Duncan*).

57. 391 U.S. at 170 (Black, J., concurring).

58. 399 U.S. 78 (1970).

59. *Id.* at 100 (so long as this function is served, the common law jury number of twelve persons need not be maintained by the states—and inferentially, not by the federal courts).

60. *Id.* at 116 (Harlan, J., dissenting).

61. *De Stefano v. Woods*, 392 U.S. 631 (1968).

62. 397 U.S. 358 (1970).

63. 406 U.S. at 360.

64. *Allen v. United States*, 164 U.S. 492, 501 (1896). See generally Note, *On Instructing Deadlocked Juries*, 78 YALE L. J. 100, 104, nn.19, 20 (1968).

whether his doubt was reasonable when it did not create a similar impression on the minds of the majority, Johnson argued that the majority could not be convinced beyond a reasonable doubt if they had failed to persuade the dissenters during deliberation. But the jury charge is directed to the individual juror.<sup>65</sup> It is he and not the jury as a whole that must be convinced beyond a reasonable doubt. Use of the *Allen* charge has fallen into disfavor,<sup>66</sup> because it urges the dissenting juror to substitute the majority's view for his own. Where the appropriate constitution requires unanimity, a hung jury will result if the individual jurors cannot come to agreement. But where the state constitution offers the less-than-unanimous verdict, a requisite majority can return a verdict without violation of proof beyond a reasonable doubt.

*Johnson* answers the question left unresolved in the conflicting *Hibdon* and *Fournier* decisions:<sup>67</sup> it is the individual, and not the whole jury, who must be persuaded to the requisite degree by the prosecution. For if the charge were addressed to the whole jury, the jury should acquit if not persuaded beyond a reasonable doubt as must the individual juror in like circumstances. However, the Court has consistently directed the federal courts, who are bound by the unanimity requirement for their juries, to grant a new trial and not acquittal where the jury is deadlocked.<sup>68</sup>

Historically, there is no reason to link the unanimity rule with the criminal standard of proof. Unanimity emerged from the common law before the end of the fourteenth century.<sup>69</sup> Proof beyond a reasonable doubt—the quantum of proof necessary to overcome the presumption in favor of the defendant's innocence—<sup>70</sup> originated in response to the harsh English penal code of the late eighteenth century. At first, this standard was applied only to capital cases as an attempt by the judges to mitigate against the severity of a code that demanded death, without benefit of clergy, for many trivial offenses.<sup>71</sup> Only later was it extended to all crimes. Until

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65. *United States v. Fioravanti*, 412 F.2d 407, 419 (3rd Cir. 1969); *Fournier v. Gonzalez*, 269 F.2d at 28. *But see* *Hibdon v. United States*, 204 F.2d at 838. *See generally* Comment, *Waiver of Jury Unanimity—Some Doubts About Reasonable Doubt*, 21 U. CHI. L. REV. 438 (1954); Ryan, *supra* note 19.

66. *United States v. Fioravanti*, 412 F.2d at 419-20 and nn.30, 31.

67. *Supra* notes 32 through 37 and accompanying text.

68. 406 U.S. at 363. *But see id.* at 401 (Marshall, J., dissenting) (claims this argument rests on a complete non-sequitur). *See* *Holt v. United States*, 218 U.S. 245, 253 (1910); *Dreyer v. Illinois*, 187 U.S. 71, 85 (1902); *United States v. Perez*, 22 U.S. (9 Wheat) 579, 580 (1824).

69. POLLOCK & MAITLAND, *supra* note 14.

70. *Holt v. United States*, 218 U.S. at 253.

71. 9 WIGMORE ON EVIDENCE § 2497 (3rd ed. 1940).

*Winship*,<sup>72</sup> many judges questioned the continued validity of the use of this standard given the present safeguards of justice in the United States.<sup>73</sup> Similar criticisms have been concerned with a unanimity requirement which offers greater protection to the criminal defendant at a time when society fears the increasing prevalence of crime.<sup>74</sup>

Despite their diverse origins, unanimity and proof beyond a reasonable doubt could have become mutually dependant upon one another during their years of coexistence. If it were true that the standard of proof was directed to the jury as a whole, a non-unanimous verdict could not be given consistent with that standard. But if directed to the individual juror, who is sufficiently convinced, the standard of proof is not reduced by not requiring unanimity.<sup>75</sup> Lessening the burden of persuasion is not identical to lessening the burden of proof. If the prosecution need persuade only nine jurors, as in *Johnson*, its burden of persuasion is lighter than if it had to convince all twelve.<sup>76</sup> It is also easier to persuade a jury of only six members rather than twelve.<sup>77</sup> But lessening the burden of persuasion does not appear to violate due process.<sup>78</sup> Therefore, the *Johnson* and *Williams* decisions would not lend support to a due process argument for lessening the burden of persuasion.

Since the trials challenged in *Apodaca* occurred after *Duncan*, these petitioners were able to claim that unanimity, required by the sixth amendment of federal jury trials, was fundamental to that right and so required for state criminal juries.<sup>79</sup> As in *Williams*, Justice White in *Apodaca* focuses on the jury's function in contemporary society.<sup>80</sup> If the purpose of the jury is to guard against government oppression by the judge or

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72. 397 U.S. 358 (1970).

73. WIGMORE, *supra* note 71.

74. See Haralson, *Unanimous Jury Verdicts*, 21 Miss. L.J. 185, 193-94 (1950). (The author, a Mississippi judge, also argues that the major defect of the unanimity requirement is not the hung jury, but plea bargaining for lesser offenses engaged in by the prosecution because of its knowledge that one juror can veto a unanimous verdict. He fails to consider that an innocent defendant might plea bargain his rights away if he fears community prejudice).

75. See *State v. Robbins*, 176 Ohio 362, 199 N.E.2d 742 (1964). See also notes 76 and 77 *infra*.

76. See Comment, 21 U. CHI. L. REV. at 433; Ryan, *supra* note 19 at 214.

77. Zeisel, . . . *And Then There Were None: The Diminution of the Federal Jury*, 38 U. CHI. L. REV. 710, 719-20 and n.42 (1971). (In Florida, where six member criminal juries are permitted, only 2.4 per cent of juries hang as compared to the 5.0 per cent average for twelve member juries).

78. Ryan, *supra* note 19 at 214-15.

79. 406 U.S. at 410.

80. *Id.*; cf. 399 U.S. at 99-100.

prosecutor,<sup>81</sup> its function is to interpose between the defendant and the state the common-sense judgment of a group of laymen.<sup>82</sup>

Justice White concluded in *Williams* that a jury will perform its function so long as it consists of (1) a group of laymen representative of a cross section of the community, (2) who have the duty and opportunity to deliberate, (3) free from outside attempts at intimidation on the question of the defendant's guilt.<sup>83</sup> If it is essential for a jury trial to meet all of *Williams* criteria, then showing that any one of these would fail without unanimity should be sufficient to have unanimity constitutionally required. Although the plurality opinion<sup>84</sup> could discern no difference in the performance of this function between unanimous juries and those permitted to render majority verdicts,<sup>85</sup> the role of unanimity as it relates to these criteria must be explored before this opinion is accepted.

Justice White rejected the *Apodaca* petitioners' argument that "unanimity is a necessary precondition for effective application of the cross section requirement . . . ."<sup>86</sup> In the Court's view, the Constitution only forbids systematic exclusion of identifiable classes from the jury panel;<sup>87</sup> it does not demand that the jury represent a cross section of the community.<sup>88</sup> Furthermore, the Court did not believe that the majority jurors would refuse

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81. 391 U.S. at 156.

82. 399 U.S. at 100.

83. See 406 U.S. at 410-11.

84. Justice White's opinion for the Court in *Apodaca* was concurred in by Mr. Chief Justice Burger, Justices Blackmun and Rehnquist. Justice Powell concurred in the judgment only. Four dissenting opinions were filed. The Court in *Johnson* divided 5-4.

85. 406 U.S. at 417.

86. Brief for Petitioners at 17-18, *Apodaca v. Oregon*, 406 U.S. 404 (1972) (argues that a jury as a cross-section of the community (1) produces a variety of perspectives, (2) protects the accused by not having his guilt determined by a jury from which his peers have been systematically excluded, (3) legitimizes imposition of criminal sanctions).

87. 406 U.S. at 413; see, e.g., *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (systematic exclusion of those opposing capital punishment); *Hernandez v. Texas*, 347 U.S. 475 (1954) (de facto exclusion of jurors of Mexican descent); *Smith v. Texas*, 311 U.S. 128 (1940) (blacks excluded by administrative procedures); *Strauder v. West Virginia*, 100 U.S. 303 (1880) (blacks excluded by law). But see *Fay v. New York*, 332 U.S. 261 (1947) (no right to jury that includes the uneducated and the lower classes—blue ribbon juries held constitutional).

88. 406 U.S. at 413; see *Hernandez v. Texas*, 347 U.S. at 482 (no right to proportional representation, no right to have juries of Mexican descent); *Swain v. Alabama*, 380 U.S. 202, 221-22 (1965) (state may use peremptory challenge even if it results in exclusion of blacks from particular juries); *Akins v. Texas*, 325 U.S. 398, 403-4 (1945) (no right to proportional representation of race—here blacks—on jury); *Ruthenberg v. United States*, 245 U.S. 480 (1918) (defendant, a Socialist, unsuccessfully protested to jury composed exclusively of members of other parties and property owners).

to hear, or refuse to allow themselves to be persuaded by, the viewpoints of the minority, when not bound by the unanimity requirement. In fact, it found no proof for the contention that a majority, in disregard of its instructions, would base its votes on prejudice rather than on evidence.<sup>89</sup>

To deny the existence or potentiality of prejudice in our society is to deny the reality of our historical experience. Soon after passage of the fourteenth amendment, the Court found unconstitutional West Virginia statutes that would prevent black men from sitting on juries.<sup>90</sup> In response, more subtle plans for systematic exclusion of certain groups have evolved, most of which have been struck down.<sup>91</sup> As recently as 1954, the state of Texas argued that its citizens of Mexican descent were not within the two classes contemplated by the equal protection clause.<sup>92</sup> In 1972, the Court found it necessary to avoid a Louisiana conviction of a black man for aggravated rape by a jury from which blacks had been systematically excluded.<sup>93</sup> Although this conviction was achieved by a unanimous vote, it is hard to believe that one or two black jurors, if their views dissented from the majority's, would have been listened to and considered in a county which was willing to have them systematically excluded from jury service. The Court has long recognized that change of venue, protection against inflammatory press coverage, and mandatory exclusion of certain information from the jury are necessary to guard against the possibility of jury prejudice.<sup>94</sup> It is necessary to agree with Justice Stewart: "The Court has never before been so impervious to reality in this area."<sup>95</sup>

Justice Powell's concurring opinion establishes that his chief concern is to retain the principle of federalism, with its concept of the states as laboratories for social experiment. He believes this principle would be threatened by making the state right to trial identical to the federal.<sup>96</sup> In his view, there is nothing in the Oregon experience to justify apprehension about non-unanimous juries.<sup>97</sup> Unfortunately, however, he does not speak to the Louisiana experience. On the other hand, his recall of Justice

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89. 406 U.S. at 414-15.

90. *Strauder v. West Virginia*, 100 U.S. 303 (1880).

91. *Supra* note 87.

92. *Hernandez v. Texas*, 347 U.S. 475, 477 (1954).

93. *Alexander v. Louisiana*, 405 U.S. 625 (1972).

94. *See* cases cited in 406 U.S. at 398-99 (Stewart, J., dissenting).

95. *Id.* at 398. *But see* Powell, J., concurring at 379. He believes there is a risk of jury non-responsibility inherent in both unanimous and majority jury verdicts.

96. *Id.* at 369-76 (Powell, J., concurring, discusses federalism).

97. *Id.* at 379.

White's admonition that the Constitution "protects against real dangers, not remote and speculative possibilities"<sup>98</sup> leads to the conjecture that some future due process argument, not linked with incorporation of the sixth amendment, and based upon facts showing majority disregard of minority views during deliberation, might move him to find unanimity itself essential to due process.

Even in Oregon, a state more homogeneous in population than many others, the majority, apparently, does not always take time to fully deliberate (as required by the *Williams* criteria) when there is no compulsion to reach a unanimous verdict. In the three trials consolidated in *Apodaca*, for example, the jury deliberated for less than thirty minutes for defendant Madden, less than fifty-one minutes for Cooper, and less than forty-one minutes for *Apodaca*.<sup>99</sup> Despite Justice White's claim that a majority will only cease discussion and outvote a minority after the point where further deliberation would be ineffectual,<sup>100</sup> the short deliberation periods in *Apodaca* raise the question whether these juries would have been hung if forced to reach a unanimous verdict or whether they would, in fact, have continued to deliberate until consensus was reached. Although only a 2 per cent increase in non-unanimous verdicts is projected upon introduction of the majority verdict, Oregon's experience under the majority verdict rule has seen the number of non-unanimous decisions rise to 25 per cent. Apparently, deliberation stops when the jury reaches the requisite majority.<sup>101</sup> Not only does the majority verdict save court retrial time and costs in 2.5 per cent of cases where the jury would otherwise have been hung, but also it saves deliberation time since it is unlikely that a judge would accept a hung verdict after the short deliberation periods in *Apodaca*. In approximately 10 per cent of jury trials conducted under the unanimity rule, the first ballot minority will eventually persuade the majority to reverse its position.<sup>102</sup> But where the majority can disregard dissenting views so quickly and where they need not labor to clarify their own views to convince the dissenters, this minority check on the majority's initial impression is diluted.<sup>103</sup>

England recently introduced majority verdicts for criminal trials, but

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98. *Id.* at 380 quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 102 (1964).

99. Reply Brief for Petitioners at 2, *Apodaca v. Oregon*, 406 U.S. 404 (1972).

100. *Johnson*, 406 U.S. at 361.

101. Kalven & Zeisel, *The American Jury—Notes for an English Controversy*, 48 CHI. B. REC. 195, 201 (1967).

102. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 488-90 (1966).

103. See 406 U.S. at 390 (Douglas, J., dissenting); see also Kalven & Zeisel, *supra* note 101 at 199.

with the requirement that the jury deliberate for a minimum of two hours before acceptance of a less-than-unanimous verdict.<sup>104</sup> The majority may abide by this arbitrary deliberation period and continue to deliberate, or it may merely watch the clock. Although Parliament's purpose was to prevent a hung jury achieved by bribery of a single juror, it would seem more logical to handle this problem through proper police methods rather than eliminate the centuries-old unanimity requirement with its self-enforcing virtue of requiring one side to consider the views of the other. At least one commentator on the English jury believes its past ease in achieving unanimity was due to the homogeneous background of the middle class who composed its juries,<sup>105</sup> a homogeneity that no longer exists.

The more heterogeneous the community the greater the need to convince the minorities that their members accused of crime, or victims of crime, receive justice.<sup>106</sup> No longer does the United States describe itself as a melting-pot—unfortunately, polarization is the language of today. It is regrettable that these decisions, which act to dilute the potency of the voice of dissent in the jury room,<sup>107</sup> should be handed down with such cavalier disregard for their effect on minorities' jury rights so laboriously won.<sup>108</sup> Those who favor a uniform system of criminal justice within our state and federal courts have lost a battle.<sup>109</sup> And the loss of unanimity, as the price paid for federalism's victory, is too high for any system of criminal justice existing in the United States today.

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104. See England's Criminal Justice Act of 1967. See also Kalven & Zeisel, *supra* note 101; Samuels, *Criminal Justice Act*, 31 MOD. L. REV. 16 (1968); Dashwood, *Juries in a Multi-Racial Society*, 1972 CRIM. L. REV., 85.

105. Samuels, *supra* note 104 at 24-25.

106. See 406 U.S. at 387 (Douglas, J., dissenting). See also Dashwood, *supra* note 104 at 87.

107. Zeisel, *supra* note 77 at 722.

108. See text accompanying nn. 90-93 *supra*.

109. Language in Justice Blackmun's concurring opinion indicates that he, at least, would find it difficult to accept majority verdicts of less than 75% despite his deference to the wisdom of the legislature. As this issue goes to press, a bill, SB 1013, 78th Gen. Assembly (1973) has been introduced in the Illinois Senate providing for the reduction in the number of jurors in criminal trials from twelve to six, except where capital punishment could be imposed. A verdict could be rendered on concurrence of four of the six jurors. Only in capital cases would the unanimous verdict of twelve jurors be retained. It is unfortunate that *Johnson* and *Apodaca* will be used to sanction a reduction in the standard of state criminal juries rather than raise the level of state criminal juries to that of the federal jury as *Duncan* seemed to promise.